

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

Amendment of Section 73.202(b),)

FM Table of Allotments,)

FM Broadcast Stations.)

(Upper Sandusky and Caledonia, Ohio))

MB Docket No. 03-7

RM-10596

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 2004**Released: February 27, 2004**

By the Assistant Chief, Audio Division:

1. Before the Audio Division is a *Notice of Proposed Rule Making*¹ issued at the request of Clear Channel Broadcasting Licenses, Inc., licensee of Station WYNT(FM), Upper Sandusky, Ohio, ("Petitioner"), proposing the reallocation of Channel 240A from Upper Sandusky, Ohio to Caledonia, Ohio, as the community's first local aural transmission service, and modification of the license for Station WYNT(FM) to reflect the change of community. Petitioner filed comments reiterating its interest in the reallocation and stating that it will file an application for construction permit to effectuate the change of community if the channel is reallocated. Franklin Communications, Inc. ("Franklin"), filed comments opposing the reallocation and Petitioner filed reply comments.

2. Petitioner filed its proposal for reallocation in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.² In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM Allotment priorities.³

3. In support of the proposal, Petitioner states that the reallocation would serve the public interest because Caledonia, 2000 U.S. Census population of 578 persons, would receive its first local aural transmission service. It presents evidence that Caledonia is a community for allotment purposes, including that it is incorporated, has its own zip code and post office, has elected officials, police and fire service, churches, schools and businesses.

¹ *Upper Sandusky and Caledonia, Ohio*, 18 FCC Rcd 109 (2003).

² *See Change of Community R&O*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

³ The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)], *See Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88, 91 (1988).

4. In opposition, Franklin argues that Upper Sandusky will be left underserved if the reallocation is granted, that Caledonia does not meet the criteria of a community for allotment purposes, and that Petitioner's true intent is to serve the community of Marion, Ohio, not Caledonia. In support of its first argument, it states that Station WXML(FM), the noncommercial FM religious format station left in Upper Sandusky, will not provide adequate transmission service to the community. In support of its second argument, it claims that Caledonia should be denied community status because Petitioner misstated Caledonia's status with the U.S. Census, and that it is listed as a city, not a Census Designated Place. They claim that previous allocations decisions support their arguments.⁴ They also include a sworn statement of Jody B. Wigton, that states that she spoke to Caledonia's mayor, and Caledonia is incorporated as a city, has a part-time mayor and city council that meets monthly. The city has only two part-time employees. Wigton also attests that Caledonia does not collect city tax, but does collect property taxes. It has no police department, but contracts with the county for sheriff's services; uses a consolidated volunteer fire department which serves it and four other townships. Caledonia provides sewer, snow removal, street paving and street light services. There are about ten businesses, including the post office, one school and two churches. With respect to the final argument, the opposition alleges that Petitioner is using this reallocation to fill a void created by its move of Station WMRN(FM) from Marion to the Columbus, Ohio, radio market.

5. In its reply comments, Petitioner argues that the remaining service in Upper Sandusky is a transmission service and that its format should not preclude its consideration as such. It distinguishes each case cited by Franklin in opposition of Caledonia's community status. In addition, it cites numerous cases in which community status was conferred on much smaller and less substantial communities than Caledonia.⁵ It also points out that all of the facts in support of the argument in opposition actually support a finding that Caledonia is a community. In further support of the community status of Caledonia, they provide a statement of Caledonia's mayor himself, who confirms that the community provides police and fire protection through contractors, street lights and maintenance, sanitary and storm sewers. He also states that the community has a funeral home, library, American Legion post and other civic clubs and organizations. They also include statements from a village council member, the fire chief, school superintendent, statements of residents attesting to their belief that the community is distinct from any other community. Also attached are a detailed map of the community, pictures of the community, including the sign on the Warren G. Harding boyhood home, as well as a copy of the village newsletter.

6. We find that Caledonia is a community for allotment purposes and that the reallocation will serve the public interest. With respect to Franklin's first argument, we have held that a noncommercial educational station is required to meet the needs and interests of the community and thus is a transmission service for purposes of the allotment priorities.⁶ We do not consider format in these matters.⁷ Furthermore, Station WXML(FM), Upper Sandusky, Ohio, provides 100% of the community

⁴ *Pleasant Dale, Nebraska*, 14 FCC Rcd 18893 (1999); *Neihart, Montana*, 14 FCC Rcd 18977 (1999); *Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991).

⁵ See e.g., *Fort Bridger, Wyoming, and Woodruff, Utah*, 17 FCC Rcd 606 (Allocations Br. 2002); *Hyannis, Nebraska*, 17 FCC Rcd 20094 (Allocations Br. 2002); *Camdenton and Laurie, Missouri*, 16 FCC Rcd 8917 (Allocations Br. 2001); *Dillsboro and Rosman, North Carolina*, 15 FCC Rcd 25562 (Allocations Br. 2000).

⁶ See *Lebanon and Speedway, Indiana*, 17 FCC Rcd 25064 (2002); *Sparta and Buckhead, Georgia*, 16 FCC Rcd 2169 (Allocations Br. 2002).

⁷ See, e.g., *WQED*, 15 FCC Rcd 2534 (2000); *Alva, Moreland, Tishomingo, Tuttle and Woodward, Oklahoma*, 17 FCC Rcd 14722 (Audio Div. 2002); *Sparta and Buckhead, Georgia*, 16 FCC Rcd 2169 (MMB 2001).

with a 70 dBu signal, and its 60 dBu signal covers 95% of Station WYNT's current 60dBu contour. We believe that this resolves any issue of service that might be raised regarding Station WXML(FM) as a transmission service. In addition, with respect to Franklin's argument that Upper Sandusky is more deserving of retaining a second service rather than Caledonia receiving its first local aural transmission service, under the allotment priorities, provision of a first local service serves priority three, whereas retention of a first competitive service serves priority four. Clearly, the priorities favor the new service at Caledonia.

7. We find that the evidence supports a finding of community status. In addition, the cases Franklin cites are inapposite. In *Pleasant Dale, Nebraska*,⁸ we held that we would not make a determination of community status without supporting documentation to show that the businesses and other services existed to serve the community in question. Franklin itself has submitted adequate documentation that Caledonia is a community for allotment purposes, and nothing it has submitted refutes any presumption of community status conferred by the facts that it is incorporated, has a post office and zip code and is listed in the Census. Petitioner has submitted additional information in support of Caledonia's community status, as well. In *Neihart, Montana*,⁹ we denied the allotment based on a lack of substantiation of community status and the location in close proximity to a national forest without any specification of a site with adequate assurance of site availability. Here, there is no issue of site availability. In *Gretna*,¹⁰ the community in question was neither listed in the Census nor incorporated. This is not the case here, and thus Caledonia is presumed to have community status.

8. Regarding Franklin's argument that Petitioner actually intends to serve the larger community of Marion (2000 U.S. Census population 35,318 persons), rather than Caledonia, Franklin has made no showing that this is Petitioner's intention or that Petitioner does not intend to serve Caledonia. Petitioner has indicated that its intention is to serve Caledonia. Further, Franklin has made no showing that Caledonia should be denied a first local service preference based on its proximity or dependence on Marion.¹¹ We are not inclined to extend our policies regarding a move-in to an urbanized area to a case such as this which involves no Urbanized Area.¹² Marion is not designated by the U.S. Census as an Urbanized Area, and Franklin has not shown that it is or should be treated as one.

9. Channel 240A can be reallocated from Upper Sandusky to Caledonia, Ohio, at Clear Channel's requested site 8.2 kilometers (5.1 miles) southwest of the community.¹³ Our engineering analysis shows that from the proposed transmitter site, there is a loss in service to an area with a population of approximately 25,368 persons, but the listeners in this area will continue to receive service from at least 5 or more aural services. We also believe that despite this resulting loss of service, this proposal will serve the public interest because the entire gain area will serve 111,378 persons and thus there will be a net gain of service to 86,010 persons.

⁸ *Pleasant Dale, Nebraska*, 14 FCC Rcd 18893 (1999).

⁹ *Neihart, Montana*, 14 FCC Rcd 18977 (1999).

¹⁰ *Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991).

¹¹ See *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

¹² See *Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876 (2001).

¹³ The coordinates for Channel 240A at Caledonia are 40-35-43 NL and 83-02-59 WL.

10. Caledonia is located within 320 kilometers (200 miles) of the U.S.-Canadian border and Canadian concurrence in the allotment has been requested but has not yet been received. However, we will reallocate Channel 240A to Caledonia at this time. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Canadian government, the construction permit will include the following condition: "Operation with the facilities specified herein is subject to modification, suspension or, termination without right to hearing, if found by the Commission to be necessary in order to conform to the Canada-United States FM Broadcast Agreement or if specifically objected to by Industry Canada."

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g), and (r), and 307(b) of the Communications Act of 1934, as amended, and 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED That effective April 12, 2004, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, as follows:

<u>Community</u>	<u>Channel</u>
Upper Sandusky, Ohio	—
Caledonia, Ohio	240A

12. IT IS ORDERED That the Secretary of the Commission shall send by Certified Mail Return Receipt Requested, a copy of this *Order* to the following:

Marissa G. Repp, Esq.
F. William LeBeau, Esq.
Hogan & Hartson, LLP
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Washington, DC 20004
(Counsel to Petitioner)

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(Counsel to Franklin Communications, Inc.)

13. IT IS FURTHER ORDERED That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Clear Channel Broadcasting Licenses, Inc. for Station WYNT(FM), Channel 240A, Upper Sandusky, Ohio, IS MODIFIED to specify operation on Channel 240A at Caledonia, Ohio, subject to the following conditions:

- a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
- c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules, unless the proposed facilities are categorically excluded from environmental processing.

14. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Clear Channel Broadcasting Licenses, Inc. is required to submit rule making fee in addition to the fee required

for the application to effect the change of community.

15. IT IS FURTHER ORDERED that the Opposition filed by Franklin Communications, Inc., IS DENIED.

16. IT IS FURTHER ORDERED that the Petition for Rule Making filed by Clear Channel Broadcasting Licenses, Inc., IS GRANTED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information contact Victoria M. McCauley, Media Bureau (202) 418 2180.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Assistant Chief, Audio Division
Media Bureau**